Office of the Attorney General
State of Tennessee

***1** Opinion No. 95-032
April 6, 1995

Emergency Communications District; Installation, Maintenance of Road Signs; County Legislative Body Liability

Senator Jerry W. Cooper
Room 309 War Memorial Building
Nashville, Tennessee 37243-0214

QUESTION

Would a county be liable for failure to put up new road name signs if a person suffers injury because an ambulance could not find the person's residence due to the lack of a road name sign, where neither the E911 program nor the county road superintendent has put up new road name signs.

OPINION

A county could be found liable under the Governmental Tort Liability Act for the failure of the county road superintendent to put up new road name signs in the circumstances described, if the installation of such signs is required by law or policy adopted by the county.

ANALYSIS

The opinion request indicates that the existence and operation of an E911 district in a county is creating a dispute over whether the E911 district, or the county road superintendent, is responsible for erecting new signs which might prevent harm caused by an ambulance's inability to locate an injured person, and whether the county could be found liable for the combined inaction of the E911 district and the road superintendent. Based on the Tennessee Governmental Tort Liability Act, which permits certain tort actions to be maintained against local governmental entities, a court would look to whether the county had a duty to erect the missing sign on a particular road.

Such a matter would involve a factual and legal conclusion under the Governmental Tort Liability Act and probably highly disputed issues of causation. This opinion will assume for the sake of analysis a fact situation where injury or death was proximately caused by the lack of a new sign. This opinion also will

assume that the road in question is one which the county owns and controls, or that even if the county does not own and control the road, that a sign on that road which needs to be changed is owned and controlled by the county. The opinion will then consider whether the operation of the E911 district alters or decreases any preexisting county duty to erect or change the pertinent sign.

A. County Liability for Highway Signs Generally:

When immunity from suit is removed by the Tennessee Governmental Tort Liability Act (GTLA), liability of the governmental entity shall be determined as if the entity were a private person. T.C.A. § 29-20-206. One provision removing immunity, T.C.A. § 29-20-203, specifically relates to road conditions, stating:

(a) Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. "Street" or "highway" includes traffic control devices.

Cases interpreting this section have held that "the statutory exception to governmental immunity provided in this section embraces street signs and traffic control devices within its terms, as well as the actual surface conditions of streets and sidewalks." Fretwell v. Chaffin, 652 S.W.2d 755 (Tenn.1983). Although a road name sign is a type of traffic control device, and the Fretwell court considered street signs generally within this section, it is unclear whether either 1) the non-existence of a road name sign to identify a road, or 2) the existence of a road name sign which identifies the wrong name of a road, can be construed as a "defective, unsafe or dangerous condition" of such sign, or of the road it relates to, within the meaning of T.C.A. § 29- 20-203. We are unaware of any case so holding, and it seems this section is directed mainly to suits about driving conditions on the road, and the adequacy of signs to alert drivers to pertinent driving conditions and limitations, not the identity of the road itself.

***2** T.C.A. § 29-20-205, the section of the GTLA most relevant to the liability question in this opinion request, removes immunity from suit of all governmental entities for injury proximately caused by a negligent act or omission of any employee within the scope of his or her employment except, among other possible exceptions, if the injury arises out of the exercise or performance or the failure to exercise or perform a discretionary function. T.C.A. § 29-20-108 specifically declares that E911 boards and board members (but not employees) are immune from any claim relating to or arising from the conduct of the affairs of the board, except in cases of gross negligence.

A "planning-operational" test has been adopted to determine which governmental acts are entitled to immunity. Bowers ex rel. Bowers v. City of Chattanooga, 826 S.W.2d 427 (Tenn.1992), after remand, 855 S.W.2d 583 (Tenn.App.1992). Planning or policy-making decisions are considered discretionary and do not give rise to tort liability, while decisions that are merely operational are not considered discretionary, and thus, do not give rise to immunity. Id. In our opinion, the development of a policy to erect or not to erect certain signs would be planning, and hence immune. Conduct, however, that fails to comply with legal requirements, including policies adopted, may give rise to liability if the failure to follow the requirements is the proximate cause of injury. Doe v. Coffee County Bd. of

Educ., 852 S.W.2d 899 (Tenn.App.1992). Thus, if a policy has been duly adopted to require the erection of new signs in a particular manner, or if other state or local law requires the erection of a road sign, but the governmental entity given responsibility by the law has failed to implement it as required, that failure, we think, would be operational, and thus, could be a cause for liability. The policy or standards adopted by a county could include policies emanating from sources such as an E911 board.

In the case of county-owned and -controlled roads, the county legislative body has a duty of general supervision of those roads. T.C.A. § 5-5-119 states that "[t]he establishment and general supervision of roads and ferries, watercourses and local improvements, are entrusted to the county legislative body, as provided in title 54, chapters 7 and 9-14." County legislative bodies are given exclusive control of the establishment and supervision of roads and ferries. Ledbetter v. Turnpike Co., 110 Tenn. 92, 73 S.W.2d 117 (1902), overruled on other grounds, Knierim v. Leatherwood, 542 S.W.2d 806 (Tenn.1976).

Assuming the county has general supervision of the road in this opinion request, the county road superintendent probably has the responsibility to carry out the county's supervisory function. County road commissioners, though authorized to supervise the roads in their districts, are merely the agents of the county to construct and repair. The general supervision of the roads remains in the county legislative body. 23 Tenn.Juris. Streets and Highways, § 42., citing Harmon v. Taylor, 83 Tenn. (15 Lea) 535 (1885). Suit may be maintained against a county for any just claim (T.C.A. § 5-1-105), and a county may be sued in the name of the members of the county legislative body, especially if no objection is made. Wilson v. Davidson County, 3 Cooper's Tenn.Ch. 536 (1877).

***3** The Tennessee County Uniform Highway Law, T.C.A. §§ 54-7-101, et seq., would make the county road superintendents of applicable counties responsible for signage on county roads. The chief administrative officer (defined as a county road superintendent under T.C.A. § 54-7-103), except in those counties with elected road commissioners or county councils wherein the general control and authority over the county road systems shall remain as is provided by private or general act, shall be the head of the county highway department and shall have general control over the location, relocation, construction, reconstruction, repair and maintenance of the county road systems of the county. T.C.A. § 54-7-109(a). Thus, the failure of a road superintendent to act for the county could form a basis for county liability in a proper case. A court would look to the acts establishing the county road superintendent in question to determine that official's specific powers and duties.

The duty of a county to erect a road sign on a particular highway might be found under regulations of the Department of Transportation. T.C.A. § 54-5- 108(b) states that:

The department [of transportation] has full power, and it is made its duty, acting through its commissioner, to formulate and adopt a manual for the design and location of signs, signals, markings, and for posting of traffic regulations on or along all streets and highways in Tennessee, and no signs, signals, markings or postings of traffic regulations shall be located on any street or highway in Tennessee regardless of type or class of the governmental agency having jurisdiction thereof except in conformity with the provisions contained in such

manual.
(Emphasis added). The Manual on Uniform Traffic Control Devices is found in Rules of the Department of Transportation, Tenn.Comp.R. & Regs. Title XIV, Chapter 1680-3-44, Part X--Tennessee Supplement, and is promulgated under authority of T.C.A. § 54-5-108. The purpose of Chapter 1680-3-44 is to supplement the Manual on Uniform Traffic Control Devices (the "Manual") promulgated by the Federal Highway Administration which has been previously adopted by rulemaking procedures, at Chapter 1680-3-1. (Rule 1680-3-44-.01). A county or municipality should consult the Manual for any specific requirements. The Manual may be consulted by the courts in evaluating duty to put up signs. See O'Guin v. Corbin, 777 S.W.2d 697 (Tenn.App.1989). The Manual presents traffic control device standards for all streets and highways open to public travel regardless of type or class or the governmental agency having jurisdiction. Manual, 1A-1. In the language of the Manual, the word "should" is not mandatory, but is a recommended or advisory condition. The word "shall" indicates mandatory usage. Manual, 1A-5. The Manual says traffic control devices "shall" be placed only by the authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic. All regulatory devices, if they are to be enforced, need to be backed by applicable laws, ordinances, or regulations. Manual, 1A-3.

***4** We would note that the conventional highway rules set forth in Chapter 1680-3-44 are not always worded in mandatory form with respect to local government. In particular, the rule most pertinent to conventional county road name signs is Rule 1680-3-44-.15, entitled "Street Name Signs," which says, in pertinent part:

(1) Local governmental agencies are encouraged to erect street name signs in urban areas at all street intersections regardless of other route marking that may be present and in rural areas to identify important roads not otherwise marked. (Emphasis added). This rule, and its advisory language substantially reflects the Manual, which says street name signs "should" be erected in urban areas at all street intersections regardless of other route marking that may be present and "should" be erected in rural districts to identify important roads not otherwise marked. Manual, Section 2D-39 (D3). Generally, the requirements for signs on controlled access and high-speed roads are more stringent.

The foregoing rules do not appear to impose a specific mandatory duty on the county to erect road name signs, but rather, encourage compliance. In rural areas, the rule does not even encourage that every road be marked, but that a decision be made to determine what are "important" roads. Other rules or laws could, by contrast, be mandatory. Depending on the class of road involved, the type of intersection, and the laws, rules and standards which are applicable to the locality, a sign may be required, or left to the discretion of the county official involved. There is no way to generalize whether a county road superintendent should erect a road sign. Also, as the Governmental Tort Liability Act decisions indicate, a policy adopted by the county requiring the county to employ standards consistent with the regulations, which was not implemented, could impose liability in the case of neglect or failure to implement the policy.

B. County Liability Where an E911 District Operates:

1. County Liability Is Not Reduced by E911 Operations Since E911 Districts May Not Erect Road Signs:

E911 districts are created by ordinance or resolution, respectively, of a municipality or county, upon approval by a majority of eligible voters within the proposed district boundaries. T.C.A. §§ 7-86-104 and -105. Regardless of the county's responsibility for roads under its ownership and control, or to change signs which it owns and controls, there appears to be no explicit statutory basis for assigning or delegating any responsibility for the erection of street and road signs to the E911 district serving that territory. This is the case even though the legislature has expressed an intent that E911 districts be involved in the process of formulating whether a road needs a new name or a changed name, and to develop policies to promote efficient delivery of emergency services through this addressing function.

Prior to the enactment of T.C.A. § 7-86-127, this Office opined that an emergency communications district did not have any authority to expend district revenues for the acquisition and installation of highway, road, and street signs. See Op.Tenn.Atty.Gen. U93-19 (February 26, 1993); Op.Tenn.AttyGen. **94- 007 (** January 13, 1994) (copies attached). Op.Tenn.Atty.Gen. **94-007** reviewed the legislative history behind Public Chapter 479 of 1993, which is codified at T.C.A. § 7-86-102(c), regarding the intended use of the funds received by the district, noting that the statute specifically deleted provisions which would have allowed E911 boards to spend funds for the purchase and installation of highway, road, and street signs. Hence, previously there would have been no possibility of any obligation by the E911 district to put up street signs of any sort. The 1994 enactment of T.C.A. § 7-86-127 did not restore or reword the provision which had been deleted from the proposed 1993 enactment, and thus the opinion of this Office remains that an E911 district has no duty or authority to erect highway, road and street signs. Thus, a county cannot look to an E911 district to put up road signs to go along with the road names it recommends.

***5** A county might have questions relating to E911 involvement in new road signs because of T.C.A. § 7-86-127. That section provides:

(a) Unless expressly provided otherwise by law, the authority to name roads and streets, and to assign property numbers relating thereto, is exclusively vested in the legislative bodies of counties for unincorporated areas, and municipalities within their incorporated boundaries; provided, that the exercise of this authority must be in a manner acceptable to the United States postal service.

(b) The legislative bodies of any county or municipality may delegate the authority provided hereunder to the emergency communications district, if there be one; provided, that the legislative body shall approve road or street name changes made by the district under such terms as the legislative body may determine.

(c) Any county or city, including districts with delegated authority, may establish and impose reasonable fees and enforce policies relating to the changing of names of roads and streets.

(d) This section may not be construed to require a local government to maintain any portion of a road which the local government has not accepted. T.C.A. § 7-86-127 (1994 Tenn.Pub.Acts Ch. 807, § 2.) (Emphasis added.)

The preamble to the 1994 enactment of T.C.A. § 7-86-127 specifically found that to more fully accomplish the purposes of the Emergency Communications District Law,

> ... it is essential that each county have a uniform system of addressing which is consistent with regulations of the United States postal service in order to achieve maximum effect with minimum inconvenience to the public. The general assembly further finds that the involvement of emergency communications districts in the addressing activity is necessary and complementary to the responsibility of local governments, which requires explicit definition.

(1994 Tenn.Pub.Acts Ch. 807, § 1, emphasis added). By enacting T.C.A. § 7- 86-127, the legislature was explicitly defining the complementary involvement of E911 districts with local governments in the "addressing activity." Still, funds received by E911 districts are limited to the purposes for the furtherance of the part establishing E911 districts. T.C.A. § 7-86-102(c). Even in light of the preamble, the wording of T.C.A. § 7-86-127 does not seem to impose any duty on E911 districts, or the ability to expend any of their resources to erect the signs which might be associated with addressing activity.

The legislative history of Chapter 807 did not elaborate on whether the E911 districts have any power or specific duties to purchase or erect road signs. Subsections (a) and (b) of § 7-86-127 were meant to clarify that the local city or county legislative body retained power to approve all street and road names, even where the E911 district was delegated some role to aid in the assignment of the names, so that it was clear the E911 district had no independent, conflicting power to finally adopt names within the local jurisdiction. Also, the General Assembly wanted to make sure that strict compliance with U.S. postal regulations was recommended but not mandated because the postal rules were not ideally suited to the delivery of emergency services. The General Assembly affirmed that the E911 board should be involved, subject to the directive of the local legislative body, in the process of making sure that street and road names adopted be consistent with the purpose of efficient location of persons or property in emergencies. Subsection (c) was adopted specifically to clarify that the authority to impose reasonable fees set forth therein relates only to the changing of names, generally at the petition of local residents, but not to the initial naming of streets. (Legislative History, 3-10-94, House Session, Representative Duer, sponsor, HB 2728, and 3-22-94, Senate State and Local Government Committee, Comments of Sen. O'Brien, sponsor, SB 2730). Subsection (d) of § 7-86-127 was written to assure that where the local government, such as the county, had not accepted a road for maintenance, this statute would not impose a new duty to maintain that road strictly arising out of road name changes or assignments made to meet the uniform addressing purpose of the E911 act. (Leg. History, 3-22-94, Senate State and Local Government Committee).

***6** Under T.C.A. § 7-86-127, the only statutory role of an E911 district in street or road name changes or assignments might occur if a delegation under subsection (b) has occurred. If a delegation has taken place from the county to the E911 district of power to name roads and assign property numbers, then, subject to the terms of the delegation, such an E911 district may, under T.C.A. § 7-86-127(b), assign road names to previously unnamed roads and propose road name changes which shall be approved by the county legislative body, or, under T.C.A. § 7-86-127(c), establish and impose "fees and policies relating to the changing of names of roads...." We do not think that the power to impose such fees and

policies as an E911 district might adopt necessarily implies the power or duty of the E911 to erect signs for newly named roads or to reflect any road name changes. Because the E911 cannot use its resources to erect road signs, the county cannot rely on the E911 to share or take over any responsibility or liability the county might already have for a sign or road in question.

2. County Duty Potentially Might Be Extended by E911 Operations Due to County Resolutions Implementing Road Names Adopted or Proposed by the E911 District:

Certain actions of the E911 board, pursuant to the terms of the particular road-naming delegation from the county under which the E911 acts, might impose on the county a greater responsibility for erecting particular signs for roads named by the E911, or for which the E911 proposed a changed name that was then formally approved by the county legislative body. As noted under the Governmental Tort Liability Act, liability can be imposed if a governmental entity fails to implement a policy which it adopted and mandated itself to implement. If the county delegates its authority relating to naming roads to the E911 board, and, for instance, proposes terms in the delegation or other county resolution dictating that the road names adopted by the E911 board be reflected in road signs to be erected by the county within a certain period of time, then the county might be found liable for failure to follow its own duly adopted policy.

An example of this is found in Watts v. Robertson County, 849 S.W.2d 798 (Tenn.App.1992), where Robertson County delegated the responsibility of the county road supervisor to make bridge inspections to the State. The State advised the county through its inspection report that approach guard rails should be installed, which the road supervisor did not implement. The private act empowering the supervisor indicated that he should inspect to see that the bridges be in good repair and safe, establish an inspection system, and keep the bridges in good repair. The duty to keep the bridges in good repair was not carried out. The county was denied summary judgment because once the bridge was inspected and determined to be in need of guard rails, the Court found that the county, by its own private act, was required to install them. Id., at 800- 801. Similarly, a county could impose increased duties on itself because of the way it chooses to interact with the E911 board and to carry out its road-naming decisions. The county legislative body maintains ultimate control over this relationship and the terms of any delegation. If the county found that the manner in which it had resolved to implement E911 district proposals or decisions was too burdensome, then the county legislative body could presumably revoke or amend the terms of the delegation, and adjust its obligations.

***7** Arguably, the terms of the delegation to the E911, or any other enactment of the county legislative body or private act, could impose duties on the county road supervisor to erect certain signs for the health, safety and welfare of its citizens even on roads which the county did not otherwise maintain. In the Harris v. Williamson County case, supra, 838 S.W.2d 588 (Tenn.App.1992), it was undisputed that the county had authority to erect traffic control devices and create a special speed zone pursuant to statute at the location in question, even though the county did not otherwise maintain, own or control the road. In Harris, a statute, T.C.A. § 55-8-152(e), provided explicit authority for the county to

establish special speed limits upon any highway or public road of the state within its jurisdiction. This is more explicit regulatory authority for affecting roads not otherwise maintained by the county than the E911 context, where T.C.A. § 7-86-127(d) makes clear that the county has no heightened responsibility for maintaining roads just because the road-naming authority set forth in that statute has been exercised. The E911 act therefore does not address the extent of either the E911's or a county's police power over signs on private roads.

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Note

TO RETRIEVE THE FULL TEXT OF THE ATTACHED OPINION(S) SET FORTH AT THIS POINT, ENTER THE FOLLOWING FIND:

FI 1994 WL 88761

FI 1993 WL 603238

Tenn. Op. Atty. Gen. No. 95-032, 1995 WL 174521 (Tenn.A.G.)

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